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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

State of California, *et al.*,  
*Plaintiffs,*

v.

Andrew Wheeler, *et al.*,  
*Defendants.*

Case No. 3:20-cv-3005-RS

**STATE INTERVENORS'  
ADDITIONAL BRIEFING IN  
RESPONSE TO JUNE 12 ORDER**

Hr'g Date: June 18, 2020

Hr'g Time: 1:30 PM

Dep't: San Francisco Courthouse,  
Courtroom 3, 17<sup>th</sup> Floor

Judge: Honorable Richard Seeborg

Action Filed: May 1, 2020

**STATE INTERVENORS' ADDITIONAL BRIEFING IN RESPONSE TO  
JUNE 12 ORDER**

On June 12, 2020, this Court asked the parties to brief whether a section of the Administrative Procedure Act (APA), 5 U.S.C. § 705, “ha[s] any effect on the considerations otherwise applicable when evaluating the propriety of a so-called ‘nationwide injunction.’” Doc. 163. It does not: that provision’s text and the case law applying it make clear that it does not change the analysis in this Circuit for determining whether nationwide relief is appropriate.

The propriety of nationwide injunctions continues to be in dispute across the country. But here, the parties agree that, at the least, a court may not issue a preliminary injunction broader than “necessary” to provide “complete relief” to the plaintiffs. *See* Doc. 30 at 49–50 (Plaintiffs contending that “a plaintiff is entitled to the injunctive relief necessary to afford her ‘complete relief’ from the harms at issue” (quoting *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Security*, 908 F.3d 476, 511 (9th Cir. 2018))). This tailoring rule is consistently applied in the Ninth Circuit to determine whether nationwide relief is permitted. For example, the Ninth Circuit held that a district court abused its discretion in ordering a nationwide preliminary injunction against enforcement of two interim final rules because “[t]he scope of the [preliminary injunction] must be no broader and no narrower than necessary to redress the injury shown by the plaintiff states.” *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018). And just last year, the Ninth Circuit applied the same rule in granting a stay of a nationwide preliminary injunction pending appeal. *See East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1028 (9th Cir. 2019). Although the “case present[ed] a rule that applies nationwide,” the Court held that any preliminary injunction must be “narrowly tailored to remedy the specific harm shown.” *Id.* at 1029 (emphases added) (citation omitted). Applying that principle, the Court stayed the nationwide relief in favor of a more limited injunction pending appeal because the “limited record” before that Court did not support the district court’s conclusion that nationwide relief was necessary to remedy the plaintiffs’ harm. *Id.* at 1030.

This tailoring rule must also be applied to stays of the effective date of an agency action granted under 5 U.S.C. § 705. This is clear from the text of that provision alone, which states that

1 the reviewing court may “postpone the effective date of an agency action” only “to the extent  
 2 *necessary* to prevent irreparable injury,” and “[o]n such conditions as may be *required*.” *Id.*  
 3 (emphases added). So, just as “[t]he scope of [a preliminary injunction] must be no broader and  
 4 no narrower than necessary to redress the injury shown by the plaintiff states,” *California*, 911  
 5 F.3d at 584, a stay of the effective date of agency action must extend no further than what is  
 6 “necessary to prevent irreparable injury.” 5 U.S.C. § 705; *see also Texas v. EPA*, 829 F.3d 405,  
 7 435 (5th Cir. 2016) (explaining that the reviewing court “ha[s] the power to stay the agency’s  
 8 action ‘to the extent necessary to prevent irreparable injury’” but staying a rule “in its entirety”  
 9 because EPA had waived any argument about the scope of the stay) (citation omitted).

10 In keeping with this textual limitation, courts in the Ninth Circuit have consistently  
 11 required tailoring of preliminary relief in cases brought under the APA, whether plaintiffs seek  
 12 nationwide preliminary injunctions, nationwide stays of agency action under § 705, or both, as  
 13 the Plaintiffs do here. *See, e.g., California*, 911 F.3d at 584 (vacating nationwide preliminary  
 14 injunction in favor of an injunction limited to the plaintiff states because “[t]he scope of the  
 15 [preliminary injunction] must be no broader and no narrower than necessary to redress the injury  
 16 shown by the plaintiff states”); *City & Cty. of San Francisco v. U.S. Citizenship & Immigration*  
 17 *Servs.*, 408 F. Supp. 3d 1057, 1127–30 (N.D. Cal. 2019) (rejecting dual request for nationwide  
 18 preliminary injunction and stay under § 705 and granting a more limited preliminary injunction,  
 19 explaining that a nationwide injunction is not “appropriate simply because this case presents a  
 20 rule that applies nationwide” and the plaintiffs “failed to sufficiently tie [the record] evidence to  
 21 the need for an injunction beyond their borders” (quoting *City & Cty. of San Francisco v. Trump*,  
 22 897 F.3d 1225, 1244 (9th Cir. 2018)) (cleaned up)), *appeal dismissed sub nom. La Clinica de La*  
 23 *Raza, Inc. v. Trump*, No. 19-17483, 2020 WL 1170719 (9th Cir. Feb. 4, 2020); *Washington v.*  
 24 *United States Dep’t of Homeland Sec.*, 408 F. Supp. 3d 1191, 1212 (E.D. Wash. 2019) (before  
 25 granting § 705 stay and nationwide preliminary injunction against public charge rule, explaining  
 26 that “the primary consideration [in deciding whether to grant nationwide relief] is whether the  
 27 injunctive relief is sufficiently narrow in scope to be no more burdensome to the defendant than  
 28 necessary to provide complete relief to the plaintiffs before the court” (cleaned up)).

Finally, the history of § 705 confirms that relief granted under that section must be tailored to the plaintiffs' harm. As the Supreme Court has explained, § 705 "was primarily intended to reflect existing law under the *Scripps-Howard* doctrine, ... not to fashion new rules of intervention for District Courts." *Sampson v. Murray*, 415 U.S. 61, 69 n.15 (1974). The *Scripps-Howard* doctrine simply recognized "the traditional authority of reviewing courts to grant stays" pending review of administrative orders. *Id.* at 76; *see also id.* at 72–74 (describing and citing *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942)). In other words, § 705 merely codified the equitable authority of reviewing courts to grant stays pending review of administrative action. This is why, as the Plaintiffs acknowledge, the analysis for determining whether a § 705 stay is warranted is essentially the same as the analysis for determining whether a preliminary injunction is warranted. Doc. 30 at 19; *see also Nken v. Holder*, 556 U.S. 418, 433–34 (2009) (stating the "traditional test for stays," which tracks the "factors governing preliminary injunctions" and "contemplates individualized judgments in each case") (cleaned up); *Washington*, 408 F. Supp. 3d at 1211 (citing *Nken* as controlling the § 705 stay analysis); *Casa De Maryland, Inc. v. Trump*, 414 F. Supp. 3d 760, 770 (D. Md. 2019) (explaining that "[c]ourts apply the same factors regarding a motion for a preliminary injunction discussed above to an application for a Section 705 stay" and collecting circuit cases to that effect).<sup>1</sup> So the tailoring rule that has long been a part of determining the proper scope of equitable relief is retained in § 705 too. *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (citing "the rule that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs"); *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987) ("Where relief can be structured on an individual basis, it must be narrowly tailored to remedy the specific harm shown."). Statutory history thus confirms what the text already says: a § 705 stay must be

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<sup>1</sup> The only difference between the two analyses is that, "[f]or a stay, the traditional test articulates the third factor in slightly different terms: 'whether issuance of the stay will substantially injure the other parties.'" *Washington*, 408 F. Supp. 3d at 1211 (quoting *Nken*, 556 U.S. at 419). That factor cuts directly against a nationwide stay in this case. As the State Intervenor explained in their opposition to the motion for a preliminary injunction, nationwide relief would impose significant harms on non-plaintiff states without providing any additional benefit to the Plaintiff States. Doc. 107-1 at 45–47.

1 limited in scope to what is necessary to prevent the irreparable harm the Plaintiffs are able to  
2 establish in a given case.

### 3 **CONCLUSION**

4 For the reasons above, a stay under § 705 may extend no further than necessary to prevent  
5 the irreparable harm the Plaintiffs are able to establish in the record. Applied here, that tailoring  
6 rule forecloses a nationwide stay for the same reasons it forecloses a nationwide injunction. At  
7 the very least, as the State Intervenors explained in their opposition, the Plaintiffs have not  
8 demonstrated in the record that irreparable harm caused by the 2020 Rule is likely to flow from  
9 the 23 State Intervenors to any of the 17 Plaintiff States, and certainly not while this lawsuit is  
10 pending. Several of the State Intervenors are not “upstream” at all from any of the Plaintiff  
11 States, and for any that may be, the Plaintiffs offer, at best, generalized speculation that new  
12 development or other activity will send enough pollution across their borders to cause irreparable  
13 harm in the time it will take to litigate this case. And even that speculation fails to account for the  
14 wide array of independent state-law protections that would likely prevent the Plaintiffs’  
15 hypothetical harms. If this Court grants a preliminary injunction or § 705 stay (and the State  
16 Intervenors maintain that neither is justified), such relief should not extend beyond the Plaintiffs’  
17 States.

Respectfully submitted.

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I hereby certify that on June 16, 2020, I served this brief by filing it with this Court's ECF system.

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